

# Bulgaria's Constitutional Troubles with the Istanbul Convention

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The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, also known as the Istanbul Convention, induced a debate of epic proportions which divided Bulgarian civil society. The polemic was so fierce that in February 2018, Bulgaria's Prime Minister, leader of Party GERB which governs in coalition with three far-right Parties, withdrew a motion for ratification from Bulgaria's Parliament. Moreover, 75 Members of Parliament from his Party GERB submitted a request before Bulgaria's Constitutional Court to establish if the Istanbul Convention contravened the spirit of Bulgaria's Constitution, including its Article 46(1), which defines marriage as 'a voluntary union between a man and a woman.' A rather controversial decision was handed down on 27 July this year – 8 judges ruled the Convention indeed contradicted Bulgaria's Constitution while 4 judges dissented.

## Background

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The Istanbul Convention purports to protect the human rights of women but uses the terms 'gender,' 'gender-based violence,' etc. This ambiguity, from a Bulgarian perspective, provoked more conservative members of Bulgaria's society to question if the Convention did not introduce the notion of 'third sex' – people who do not identify as male or female. During the discussions at the Council of Ministers, Bulgaria's Deputy Prime Minister from the right-wing VMRO stated: 'There are phrases and words in the Convention which give serious grounds for society to doubt if they will not be used to impose unconventional conceptions of gender, such as the third sex, and to legalize same-sex marriages in Bulgaria at a later stage. These issues really worry our society.' The leader of Bulgaria's largest opposition Party BSP (socialists) has also expressed worries: 'You cannot impose a convention on a given society. You cannot impose gay marriage. No chance!' It is worth mentioning, however, that the Convention itself contains no references to same-sex marriage – it only mentions marriage in the context of forced marriages.

The debate touches upon problems to which Bulgarian society is sensitive. Bulgaria still struggles to guarantee the rights and freedoms of the LGBTI community – the 2018 Rainbow Europe Index, which ranks countries based on policies and laws that have a direct impact on the human rights of LGBTI people, ranked Bulgaria 34th out of the 49 European countries it monitors. At the same time, the European Institute of Gender Equality gave Bulgaria the worst score in the EU in its composite measure of violence against women. This implies that the country has a more pronounced problem with the prevalence, severity, and disclosure of violence against women compared to many other EU countries. The Special Eurobarometer 465 survey on Gender Equality in 2017 also shows that Bulgaria entertains considerably more 'patriarchal' beliefs on the role of women compared to other EU Member States: 81% of respondents agreed that the role of women was to take care of the home and the family.

## A disappointing decision

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The decision, which Bulgaria's Constitutional Court delivered on 27 July, may cause a stir among Western commentators not only because of its result, but also because of its peculiar legal arguments and untidy, repetitive narrative. One may indeed question if the majority were not influenced by public opinion or even by their personal values since intolerance towards the LGBTI community as well as a stereotypical view of the role of women seem to show through the legal reasoning.

The arguments that the judges put forward can roughly be divided into two clusters, which are related and intertwined throughout the decision: 1) the Convention is self-contradictory and has a broader scope than its title suggests, which can compromise the rule of law in Bulgaria; 2) Articles 3(c) and 4(3) of the Convention are not compatible with Bulgaria's Constitution.

## A 'contradictory' Convention?

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The first line of reasoning seems to reflect a misconception about the use of terms. The majority held that it was 'obvious' that the Istanbul Convention was self-contradictory because its title referred to the protection of women, but most of its provisions used the

term 'gender.' This, in turn, created grounds for inconsistent interpretations, which compromised the idea of the rule of law. The majority also emphasized that 'the meaning implied in the terms, which were used, not only did not promote equality between the sexes, but blurred the differences between them, thus depriving the principle of equality of any meaning.' Overall, 'if society lost its ability to differentiate between a woman and a man, combatting violence against women would remain a formal commitment, which was impossible to fulfill.'

These 'apocalyptic' and somewhat misguided conclusions seem to be based on assumptions rather than on the text of the Convention itself. In that light, it is worth noting that in a statement of March 2018, the Executive Secretary of the Istanbul Convention at the Council of Europe, who was palpably concerned about the direction of debate in countries like Bulgaria, underscored that the Convention distinguished between 'sex' and 'gender' for the sake of clarity: '... gender refers to expected roles for women and men – and how too often these roles are defined by out-dated stereotypes that can make violence against women, intimidation and fear more “acceptable.”'

The majority of Bulgaria's constitutional judges were particularly troubled by the fact that the Convention did not provide a definition of the term 'gender identity.' The judges reviewed resolutions by the Council of Europe aimed at promoting LGBTI rights and asserted that there was 'a link between the Council of Europe's policy on the prevention and combating of violence against women, such as discrimination against women based on gender, and the protection of certain rights of transgender people.' Moreover, they asserted that the term 'gender identity' had to be understood in light of Paragraph 53 of the Explanatory Report to the Convention, which provides clarifications on non-discrimination grounds pursuant to Article 4 of the Convention. It explicitly mentions discrimination against transgender people in a long list of grounds, which 'are of great relevance to the subject-matter of the Convention.'

It is, nonetheless, unclear how the alleged 'link' between the protection of women from violence and the protection of the rights of transgender people could blur the differences between men and women or lead society to lose its ability to distinguish between a man and a woman. This is a point on which Judge Dimitrov dissented by overtly ironizing the majority's argument. He called their reasoning an 'enigma' and asserted that '... it turns out that recognizing the mere fact of life that there are lesbian or transgender people means that men and women will become the same. Thank God, nothing in the text of [Bulgaria's] Constitution shows [our] legislators had such concerns!' Meanwhile, Judge Dimitrov's reasoning may appear obscure as he seems to challenge the argument from the perspective of both lesbian and transgender people. By contrast, the majority explicitly refers to transgender people only. It is difficult to discern, however, why Dimitrov mentions the rights of lesbians in this concrete context, especially because he does not elaborate.

It is also perplexing how the Convention can jeopardize the rule of law in Bulgaria even if one accepts the court's argument that Paragraph 53 of the Explanatory Report indeed obliges courts to extend the protection of Article 4 of the Convention, which covers discrimination, to transgender people. Judge Dimitrov dissented on this point as well: he underscored that transgender people, like all Bulgarian citizens, are protected by Bulgaria's Constitution and by diverse pieces of national legislation against discrimination.

Yet, in fact, he could have gone much further. As an EU member, Bulgaria is bound by the EU Charter of Fundamental Rights. Its Article 21 states: 'Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.' To remind judges of the importance of this provision, Bulgaria's legislator has even copied it almost verbatim in Article 4(1) of Bulgaria's Law on Protection against Discrimination. The Charter's Article 1 on the inviolability of human dignity can also be used to challenge the argument of the constitutional court.

## The (in)compatibility with Bulgaria's Constitution

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The second line of reasoning, which emerges, is also striking because of the narrow conception of the social role of women it endorses. The majority held that the notion of gender enshrined in Articles 3(c) and 4(3) of the Convention was not compatible with Bulgaria's Constitution. It underlined that 'the Constitution and Bulgaria's legislation as a whole were built on the understanding of the binary existence of human species.' The court held that the Convention contradicted Article 6(2) of Bulgaria's Constitution, which forbids limitations of rights based on various factors, including the sex of a person. In particular, it referred to Article 47(2) of Bulgaria's Constitution and concluded that 'the female biological sex was related to the following social roles – "mother," "giving birth," and "obstetric care."'

In principle, Article 47 envisages the rights of mothers and children. The concrete paragraph 47(2) stipulates: 'A woman who is a mother benefits from the special protection of the State, which ensures she has paid maternity leave before and after giving birth, free obstetric care, alleviated working conditions and other social care.'

It is bewildering why the constitutional rights of mothers serve as a definition of the social role of women in general. It seems that the court literally reduced women to their childbearing function by overstretching the scope and purpose of the concrete provision at hand. Needless to say, there are women who deliberately choose not to be mothers or women who become mothers without giving birth – by adopting a child, for example.

Moreover, Judge Penchev who dissented emphasized that Article 2(5) of Bulgaria's Law on the Equality between Women and Men established the 'overcoming of gender-based stereotypes' as a key principle of Bulgaria's State-policy towards equality while Section 1(1) of its Additional Provisions stipulated that 'men and women are free to develop their personal abilities and make choices without limitations of the social role of their sex.' In other words, the conception of the social roles of women and men, which comes into view from other pieces of Bulgarian legislation in force, is significantly broader and more flexible.

While Judge Penchev's argument is compelling, it may be criticized from the perspective of the hierarchy of sources. Whereas both the Constitution and the various laws and codes in force in Bulgaria are primary sources of law, Article 5(1) of the Constitution establishes: 'The Constitution is the supreme law, and no other law shall contravene it.' That is why, it seems his argument would have been enhanced had he also invoked the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which Bulgaria has ratified. Pursuant to its Article 5(a), Bulgaria is bound to '... modify the social and

cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.’ In that light, under Bulgaria’s very own Constitution, international conventions, which have been ratified and have entered into force, have primacy over national legislation. Article 5(4) of the Constitution states: ‘International treaties which have been ratified in accordance with the constitutional procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation.’

It is also interesting that the court proceeded to generalize that ‘[t]raditionally, human society is built on binarism, or the existence of two opposite sexes, each of which has specific biological and social functions and responsibilities. The biological sex is determined by birth and is the basis of civilian sex.’ The court relied on this statement to conclude that ‘the understanding that marriage is a relationship between a man and a woman is deeply rooted in Bulgarian legal consciousness ...’ It is puzzling why the court needed to protect the traditional Bulgarian notion of marriage based on the argument that sexes have not only biological, but also distinct social functions and responsibilities. Article 46(2) of Bulgaria’s Constitution, for instance, stipulates that ‘[s]pouses have equal rights and obligations in marriage and in the family’ and does not separate these obligations based on social/biological role.

Finally, it should also be noted that in passing, the court contended that Bulgaria’s legislation contained diverse provisions which allegedly served as evidence of the country’s determination to protect fundamental rights, including the rights of victims of violence, thus implicitly suggesting that the Convention would not strengthen the national legislation. Ironically, many of the examples the judges refer to are transpositions of EU Directives rather than examples of independent national initiatives. It is also difficult to reconcile this statement with the alarming data on violence against women in Bulgaria by reputable organizations cited above. Obviously, the current legislation in force either does not deter violence or is not rigorously enforced – issues, which Bulgaria needs to address. Moreover, it is unclear how fragmented, piecemeal solutions can lead to the same results as a comprehensive legal instrument, such as the Istanbul Convention.

## Beyond the constitutional question

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Certainly, the decision by Bulgaria’s Constitutional Court leaves a bitter taste because of the suspect legal logic which underpins it. Judge Dimitrov, mentioned above, as well as Judges Nenkov and Angelov who also dissented in a separate opinion alluded that there may be non-legal factors which motivated it, including political campaigns and the loud public uproar by some conservative groups. Because of unconvincing reasons, Bulgarian women are deprived of protection which they urgently need.

In parallel, however, one may also wonder if the 75 Members of Parliament from the ruling Party GERB who made the request for constitutional review were truly worried about the opinion of their constituency or if rather they were trying to distract society from other

pressing issues. Power in Bulgaria is concentrated: many anti-constitutional laws have been enacted because of orders from the top, without much concern for public opinion. The representatives of the ruling Parties usually vote en bloc.

The way the highly controversial amendments to the Code of Criminal Procedure, which provided the Prosecutor's Office with further excessive powers, were passed in 2017 is particularly revealing. The government was numb to the fervent criticism that these amendments were anti-constitutional by the Association of Bulgarian Judges, the Association of Bulgarian Lawyers and various human rights NGOs, and ignored public protests. In principle, the type of public bodies, which can submit requests for constitutional review, and the instances in which they can do so, are restricted under Article 150 of Bulgaria's Constitution. Furthermore, in the past, when it suited their agenda, ruling Parties, including GERB, simply amended the Constitution. In 2015, for instance, without much ado, Parliament made important constitutional amendments concerning the Supreme Judicial Council – the key institution responsible for the election and promotion of magistrates as well as for the monitoring of their ethical values.

Fueling a debate, which can divide society, such as the conflict over the Istanbul Convention, may indeed be in the government's interest. It shifts focus away from failures in other areas – the rampant corruption and the illegitimate pressure over the judiciary, to name a few. In turn, the socialist opposition relies on a traditional line of attack, too: historically, populism has proven effective to win votes. Regrettably, Bulgarian socialists are currently trying to gain political dividends by leading a campaign on 'family values,' which dismisses the vulnerable LGBTI community. This is ironic considering that modern socialist Parties usually support minority groups and promote LGBTI rights, all the more that the Party of European Socialists of which Bulgarian socialists are members supports the Istanbul Convention.

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